IN THE COURT OF APPEALS OF IOWA

No. 3-1005 / 13-0061
Filed January 9, 2014

DONALD E. GARTIN,
Plaintiff-Appellant,

vs.

CAROLE JO FARRELL, a/k/a CAROLE J. FARRELL,
Defendant-Appellee.

Appeal from the Iowa District Court for Lucas County, David L. Christensen, Judge.

Donald Gartin appeals from the district court's ruling in his favor establishing a prescriptive easement as to a fence erected on his adjoining landowners' land. **AFFIRMED.**

Timothy B. Liechty of Bell, Ort & Liechty, New London, for appellant.

Nicholas J. Pellegrin and Michael J. Streit of Ahlers & Cooney, P.C., Des Moines, for appellee.

Heard by Doyle, P.J., and Tabor and Bower, JJ.

DOYLE, P.J.

Donald Gartin appeals from the district court's ruling in his favor, establishing a prescriptive easement on his adjoining landowner's property. He complains the court should have found in favor of his first theory of relief, acquiescence, rather than his alternate theory of relief, easement by prescription. He also asserts the court erred "in the extent of the easement" because the easement granted was not large enough. We affirm.

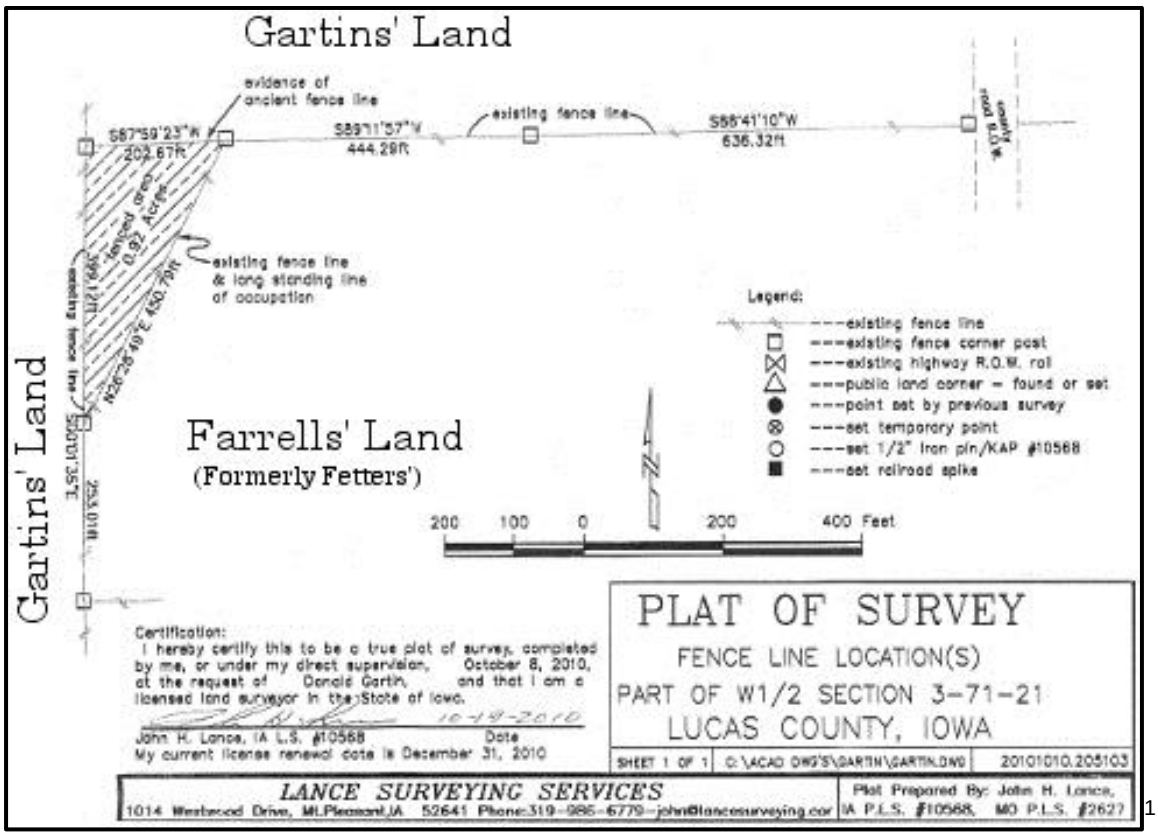
***I. Background Facts and Proceedings*.**

The underlying litigation in this appeal concerns a fence erected in 1990 by the then-adjoining landowners and good friends, Eldon and Dorothy Fetters (the Fetters) and John and Ora Gartin (the Gartins). At the time the 1990 fence was proposed, the Gartins owned a rectangular piece of land situated directly to the west of a rectangular piece of land owned by the Fetters. The historical boundary line between the two pieces of land was demarcated with a fence ("historical fence") running north to south in an approximate straight line on the property border. The historical fence was maintained under what is known as the "left-hand rule," wherein the northern half of the historical fence was maintained by the western landowners, the Gartins, and the southern half was maintained by the eastern landowners, the Fetters.

A small waterway ran diagonally southwest through the northwest-corner region of the Fetters' land into the Gartins' land. Over the years, the waterway has eroded the land, and the waterway itself has in parts become bigger and surrounded by a ravine. As a result of the changing waterway, parts of the historical fence ended up in the waterway and ravine, causing it to deteriorate

and making it difficult to maintain. Although the land around the historical fence was not used by the Fetters or the Gartins due to its rough terrain, a fence was required to keep cattle grazing on the other part of the Fetters' land in place.

In 1990, because the historical fence was in bad shape and because the Gartins were elderly and physically unable to maintain their portion of the historical fence in the waterway and ravine, the Gartins and the Fetters struck an oral agreement to erect a sturdy new fence. It was agreed the fence would be relocated on the Fetters' land to the east of the waterway and ravine, running diagonally. The Gartins bought the materials for the fence, and they paid Eldon Fetters to build it. Joe Farrell assisted in the building.


[1]

[1] This survey is in edited form from the original exhibit in the record.

The fence was indeed sturdy. It remains today and is the subject of the underlying litigation, along with the small triangle of land formed to the west of the 1990 fence, equaling approximately .92 acres.

Appellant Donald Gartin (Donald) is the Gartins' son and the current owner of his parents' former land. Appellee Carole Farrell is now the sole owner of the Fetters' land containing the 1990 fence, which she and her husband Joe Farrell owned jointly until his death in February 2012. Joe continued the tradition of maintaining the southern portion of the historical fence over the years, and he would let Donald know if there was something Donald needed to do or fix concerning the 1990 fence because Donald lived out of town.

At some point, issues arose between the Farrells and Donald. The Farrells stated Joe told Donald the 1990 fence needed certain maintenance, and Donald refused to complete the necessary repairs. Joe threatened to tear the 1990 fence down, and litigation ensued.[2] It is undisputed that the disputed .92 acres of land was contained in the legal description of the property conveyed to the Farrells by the Fetters.

In October 2011, Donald filed his petition for writ of temporary and permanent injunction. The petition stated the Farrells informed him they were going to remove the 1990 fence and install a fence on the true state survey boundary line. Donald asserted the 1990 fence had been recognized by the property owners as the boundary fence for more than twenty years, and he

[2] A meeting of fence viewers for the local township was convened after the Farrells requested they determine the parties' fence obligations. The viewers observed the site and found two competing fences were in place, and they determined they were not authorized to determine the legal boundary.

sought a temporary and a permanent injunction from the court to stop any action by the Farrells and for damages. The court then entered a temporary writ of injunction.

The Farrells subsequently answered, disputing Donald's claims. They maintained the 1990 fence was never intended to be a boundary fence by the adjoining landowners, and, until recently, there had been no openness, notoriety, or hostility as to the disputed area. The Farrells requested the petition be dismissed.

In May 2012, Donald amended his petition to request the court establish the property boundary. In particular, he requested the court establish the boundary line "consistent with the current [1990] fence location; or in the alternative establish a permanent easement consistent with the current location of the located fence."

The matter proceeded to trial in September 2012. Although Donald maintained at trial that the parties and prior landowners treated the 1990 fence as the property boundary, as relief in the case, he specifically requested the injunction

> be made permanent, that the Farrells should not be allowed or their successors, heirs, or assigns should not be allowed to tear out that [1990] fence. And I believe that the Court should determine that their responsibility for the respective boundary lines is defined under the left-hand rule and that the northerly part as this relocated fence exists would be the part for which I'd be responsible; the fence south of that southern end post would be the responsibility of the Farrells or their heirs and assigns. I—I want the fence left in place, and I'm willing to accept the responsibility for that relocated fence.

In clarifying Donald's request, the following exchange took place between Donald and his counsel:

> Q. Does it make a difference to you whether the Court finds that there's—that the boundary was actually relocated or that you have an easement? A. I defer to the lawyers on that, but I—I'm relatively indifferent to that dichotomy.
>
> Q. So your main goal is to retain the fence where it's at? Regardless of whether it's boundary—relocated boundary or it's a prescriptive easement, your impetus here today is to have that fence be where it's at? A. Absolutely. And if it's—if there's a requirement to relocate it in to the center of that ditch, I—I just don't know how you'd do it.
>
> Q. And to be specifically clear, you're willing to continue to carry the obligation of the fence on the relocated fence even though it's a longer distance than the southern part? A. Yes.

On his cross-examination, Donald was again asked to clarify his position:

> Q. Now, as I understand your case today, the case before the Court, you're, in effect, asking the Court to take from the Farrells .92 acres? That's in Count I. Is that right? A. Whatever you understand, I—
>
> Q. What do you want? A. I don't want to argue with you about it. I want the fence left where it is.
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> Q. Which gives you .92 acres of Farrell land; is that correct? A. I—I suppose in a sense. That area had been abandoned by the Fetters when they built the fence on their land in accord with the agreement between my—them and my parents in 1990.
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> Q. Okay. In the second count of your petition you're asking for an easement, and I assume that the easement would be the diagonal fence that's presently located, would that be—is that what you intend? A. I—I think that's, fair. That's an alternative.

Conversely, Carole testified at trial the 1990 fence was a fence of convenience that "enabled the older people who owned the land at the time to not have to go in a ditch and maintain a fence in a—in a ditch" and not a fence depicting a new boundary. She testified she and her husband never transferred any of the ownership of their property to anyone else, but she admitted, because of the way the fence was constructed, neither she nor the prior landowners had

access to the disputed .92 acres of land. She also testified her husband was the one who maintained the fence and she knew very little about the farm operation.

After trial, the parties submitted proposed rulings to the district court. In Donald's response to Carole's proposed ruling, Donald advised the court he was "indifferent to a relocated boundary or an easement to maintain the fence in its current location."

The district court entered its ruling in October 2012. The court denied Donald's acquiescence claim, stating, without any further discussion, that "[a]fter a review of the evidence, statutes, and case law, the court concludes [Donald] fail[ed] to establish his claim in Count I." However, the court found Donald established a prescriptive easement, explaining:

> a prescriptive easement arose since the diagonal fence constructed on the land owned by the Fetters was done pursuant to an oral agreement and with the express consent of Fetters, and [the Gartins] expended substantial amounts of money for materials and labor to construct the permanent diagonal fence with the consent of Fetters and as consideration for the mutual agreement.

The court confirmed Donald had a "permanent easement thirty feet in width, the centerline of which is the [1990] diagonal fence line described in the [survey]," and declared Donald, his heirs, successors, or assigns are responsible for the repair, maintenance, and replacement of "the 450.79 feet of the [1990] diagonal fence line." The court confirmed Carole's ownership of the .92 acres, and found Carole, her agents, heirs, successors, or assigns also responsible for "the south 253.01 feet of the historic boundary," as well as enjoining and restraining them from "damaging, altering, removing, or modifying the [1990] diagonal fence."

Both parties filed 1.904(2) motions. Relevant here, Donald's motion requested the court enlarge its findings to explain its denial of his boundary-by-acquiescence claim. The court subsequently denied both parties' motions without any discussion. Donald now appeals.

II. Scope and Standards of Review.

"Generally, we will hear a case on appeal in the same manner in which it was tried in the district court." *Johnson v. Kaster*, 637 N.W.2d 174, 177 (Iowa 2001). The parties agree this case was tried in equity, and both assert our review is de novo. However, we note acquiescence cases are tried at law under chapter 650 and "heard as in an action by ordinary proceedings." Iowa Code § 650.15 (2010). Consequently, our review of Donald's acquiescence claim is on assigned errors. *See Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 804 (Iowa 1994). We engage in a limited review on that issue, and the district court's findings are the equivalent of a jury's verdict. *See Id.* If supported by substantial evidence, the court's ruling should not be disturbed on appeal. *Id.* As an appellate court, "it is not our province to solve disputed factual questions nor pass on the credibility of witnesses." *Concannon v. Blackman*, 6 N.W.2d 116, 118 (Iowa 1942).

We review the other equity claim de novo. *Brede v. Koop*, 706 N.W.2d 824, 826 (Iowa 2005). "In a de novo review, the appellate court examines the facts as well as the law and decides the issues anew. The district court's factual findings are accorded weight, but are not binding." *Id.* (internal citations omitted).

III. Discussion.

On appeal, Donald asserts the court erred "in the extent of the easement" and in failing to find in his favor on his acquiescence claim. Carole does not cross-appeal. However, she challenges Donald's ability and grounds to appeal, given the relief he requested was granted by the district court. In the event we address his claims, she argues the easement was correct and there was no acquiescence.

A. Grounds for Appeal.

In response to Carole's challenge of his ability to appeal, Donald states his "petition and testimony proposed consistent alternate legal theories wherein the same evidence can be used to demonstrate either legal theory." He asserts "[i]t is not equitable to assess against a party the foresight to provide evidence or testimony concerning unforeseen limitations imposed *sua sponte* by the [c]ourt." He now claims:

> The importance of the .92 acre is not the value of the land itself, but rather the avoidance of having to fence all three sides of the .92 acre. [Donald] testified in belief the fence and .92 acre are inseparable, an all-or-nothing result under either of the proposed legal theories
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> . . . The [court] included easement provisions similar to utility easements. The circumstances of fences are totally different from utility easements. Neither party requested or procured any testimony or evidence to advocate for or against establishment of a 30 foot easement at the original hearing.

He also objects to the use of his response to Carole's proposed ruling to the district court as evidence he got what he asked for, noting the response is not part of the evidence relevant to the ruling.

We find his arguments unconvincing. We appreciate that a finding of acquiescence would be more favorable to Donald, and we realize the general rule is that a party may appeal a judgment that does not provide all the relief sought. *See* 4 C.J.S. *Appeal & Error* § 253 (2013). But under Iowa law, if a party poses his or her requests for relief in the alternative, and the court accepts one of the alternatives, the court's ruling is not adverse. *See Dow v. McVey*, 156 N.W. 706, 707 (Iowa 1916) ("If two inconsistent prayers for relief be made, the court can properly grant but one, and, if it grants one, the plaintiffs can make no valid complaint because it denied the other."). That is precisely what happened in this case. Accordingly, we could dismiss his appeal. Nevertheless, even if Donald could challenge the relief he requested, we find no error in the court's conclusion Donald failed to establish a boundary by acquiescence, and, reviewing the record de novo, we agree with the district court's establishment of only a thirty-foot wide easement surrounding the fence.

B. Acquiescence.

Iowa Code section 650.14 provides: "If it is found that the boundaries and corners alleged to have been recognized and acquiesced in for ten years have been so recognized and acquiesced in, such recognized boundaries and corners shall be permanently established." The term "acquiescence" is defined as

> the mutual recognition by two adjoining landowners for ten years or more that a line, definitely marked by fence or in some manner, is the dividing line between them. Acquiescence exists when both parties acknowledge and treat the line as the boundary. When the acquiescence persists for ten years the line becomes the true boundary even though a survey may show otherwise and even though neither party intended to claim more than called for by his deed.

Egli v. *Troy*, 602 N.W.2d 329, 332 (Iowa 1999).

The burden is upon the party claiming a boundary line different from that disclosed by a survey to establish acquiescence by clear proof. *Brown v. McDaniel*, 156 N.W.2d 349, 351 (Iowa 1968). Acquiescence may be inferred by the silence or inaction of one party who knows of the boundary line claimed by the other and fails to dispute it for a ten-year period. *Tewes*, 522 N.W.2d at 806. The original intent in erecting the fence is not important; the only question is whether the two adjoining landowners, for ten years or more, mutually acquiesced in that fence as a boundary line notwithstanding the purpose of its erection. *Sorenson v. Knott*, 320 N.W.2d 645, 647 (Iowa Ct. App. 1982).

Although the district court did not set forth any analysis, we agree with its ultimate conclusion that Donald failed to prove a new boundary by acquiescence. Because the terrain around the waterway is rough and generally unusable, neither the prior landowners nor the parties use(d) or maintain(ed) that area at all, except for the fence and the immediate area around it. There is no evidence the Gartins or the Fetters treated the fence as the property line, let alone evidence the Fetters, and thereafter the Farrells, knew the Gartins claimed the fence was the property line and did nothing. Rather, the record reveals a fence was needed, the prior landowners agreed it would be easier to maintain on the eastern side of the waterway, and the Gartins maintained the needed fence because the Gartins and the Fetters agreed to maintain the entire fence in a way that made the Gartins responsible for the northern part of the fence. We therefore find no error in the district court's ruling Donald failed to prove a new boundary by acquiescence.

C. Extent of the Prescriptive Easement.

A prescriptive easement is only created "when a person uses another's land under a claim of right or color of title, openly, notoriously, continuously, and hostilely for ten years or more." *See Johnson v. Kaster*, 637 N.W.2d 174, 178 (Iowa 2001). It must be established that the owner of the land on which the easement is claimed "had express notice of the claim of right, not just the use of the land." *Brede*, 706 N.W.2d at 828. However, the Iowa Supreme Court has endorsed a relaxed standard for a prescriptive easement where "the party claiming the easement has expended substantial amounts of labor or money in reliance upon the servient owner's consent or his oral agreement to use." *See id.*

Here, the record shows the fence was originally placed on the Fetters' land as a convenience to both prior adjoining landowners, and the 1990 fence was paid for by the Gartins. The district court found this was sufficient under the relaxed standard to establish a prescriptive easement as to the fence and its immediate area, and no more. Other than the immediate area surrounding the fence, the record shows the remaining part of the .92 acres west of the fence is unused and has been unused since both parties became landowners. Donald had not shown there was an agreement for the Gartins to use the remaining part of the property west of the fence; the property is unusable. Upon our de novo review, we agree with the extent of the prescriptive easement established by the district court—fifteen-foot in width around the 1990 fence, and no more.

IV. Conclusion.

For the foregoing reasons, we affirm the ruling of the district court. Costs are assessed to Donald.

AFFIRMED.